July 14, 2008

COMMENTS OF THE PACIFIC NORTHWEST INVESTOR-OWNED UTILITIES RESPECTING BPA DRAFT MASTER REGIONAL DIALOGUE CONTRACT TEMPLATE AND THE BPA DRAFT NR BLOCK TEMPLATE

Avista Corporation, Idaho Power Company, PacifiCorp, Portland General Electric Company and Puget Sound Energy, Inc. (Pacific Northwest Investor-Owned Utilities) submit the following comments respecting the draft **MASTER REGIONAL DIALOGUE CONTRACT TEMPLATE** *(07/02/08 Version)*("draft Template"), as distributed by BPA, and respecting the corresponding provisions in BPA's other contract templates.

Below are highlighted several substantive comments to the draft Template. Also attached and incorporated herein by this reference are

(i) a black-line of the draft Template, and

(ii) a black-line of the BPA DRAFT NR Block Template (that BPA indicates is based on the July 2, 2008 version of the PF Block Template and on which BPA's black-lines have been accepted)

that provide additional comments and provide some specific language revisions that should be made to the draft Template (although specific language revisions are not necessarily included for each comment below or in the attached black-line) and the BPA DRAFT NR Block Template, respectively.

The Pacific Northwest Investor-Owned Utilities appreciate the opportunity to submit these comments.

I. THE DRAFT TEMPLATE MUST RECOGNIZE AND PERMIT THE ALLOCATION OF SECTION 7(B)(2) TRIGGER AMOUNTS, IF ANY, PURSUANT TO SECTION 7(B)(3) OF THE NORTHWEST POWER ACT.

The PF Preference rate is available to consumer-owned (public body and cooperative) utilities and Federal agencies for purchases under section 5(b) of the Northwest Power Act to meet their general requirements (i.e., power purchased under section 5(b), exclusive of any new large single load). Section 7(b)(3) of the Northwest Power Act requires that "[a]ny amounts not charged to public body, cooperative and Federal agency customers [for purchases under section 5(b) of the Northwest Power Act to meet their regional firm load net requirements, exclusive of any new large single load] by reason of paragraph (2) of this subsection shall be recovered through supplemental rate charges for all other power sold by the Administrator to *all customers*." 16 U.S.C. § 839e(b)(3) (emphasis added). Thus, to the extent that there is any section 7(b)(2) trigger amount, BPA is required to allocate such 7(b)(2) trigger amount to all power sold by the Administrator to all customers, other than power sold for the general requirements of preference customers at the PF Preference rate. Accordingly, any section 7(b)(2) trigger

amount must be allocated to all rates (other than the PF Preference rate), including (but not necessarily limited to) the PF Exchange rate, the IP rate, the NR rate, the FPS rate, and the portion of the Slice rate attributable to secondary energy. Any BPA contract for the sale of power under such rates should expressly contemplate, and must not purport to prohibit, the supplemental rate charge required by section 7(b)(3) of the Northwest Power Act for any section 7(b)(2) trigger amount.

II. ENVIRONMENTAL ATTRIBUTES MUST NOT BE ALLOCATED ONLY TO OR FOR THE BENEFIT OF PF PREFERENCE RATE CUSTOMERS.

Proposed Exhibit H of the draft Template addresses the disposition by BPA of Environmental Attributes, which are defined as "the current or future credits, benefits, emission reductions, offsets and allowances attributable to the generation of energy from a specific renewable resources." The definition of "Environmental Attributes" in the draft Template notes that "[o]ne megawatt hour of energy generation from such renewable resource is associated with 1 megawatt hour of Environmental Attributes." As used in proposed Exhibit H, Renewable Energy Credits ("RECs") are certificates that document the ownership of Environmental Attributes.

Under proposed Exhibit H, BPA would transfer to the contracting PF Preference rate customer (i) a pro rata share of Tier 1 RECs based on the customer's Rate Period High Water Mark (RHWM), without any charge or premium in addition to the charge for the associated electrical power, and (ii) a pro rata share of applicable Tier 2 RECs (or the value thereof).

Under proposed Exhibit H, (i) the value of carbon emission credits or similar carbon instruments, associated with resources whose costs are recovered in a Tier 1 rate will be shared on a pro rata basis among all holders of CHWM Contracts and (ii) the value of carbon emission credits, or similar carbon instruments, associated with resources whose costs are recovered in a PF Tier 2 rate will be shared on a pro rata basis among customers within the same respective Tier 2 Cost Pool.

The value of Tier 1 and Tier 2 Environmental Attributes, carbon emission credits or similar carbon instruments should not be allocated solely to PF Preference rate customers. The draft Template fails to take into account the fact that costs of resources acquired by BPA are assigned to various rates, including both the PF Preference rate and the PF Exchange rate.

The draft Regional Dialogue Contract Templates fail to take into account the fact that costs of resources acquired by BPA are assigned to various rates, including both the PF Preference rate and the PF Exchange rate. Regional Dialogue contracts must not assign Environmental Attributes or carbon emission credits or similar carbon instruments associated with those resources solely to PF Preference rate customers. Instead, PF Exchange rate customers are entitled to a full share—if, as, and when PF Preference customers share in any Environmental Attributes (or the value thereof) and in any carbon emission credits and similar carbon instruments (or the value thereof), associated with BPA resources. This is true with respect any Environmental Attributes and any carbon

emission credits and similar carbon instruments associated with either Tier 1 resources or Tier 2 resources, insofar as the PF Exchange rate resource costs reflect the costs of both Tier 1 resources and Tier 2 resources. The draft Template and the Residential Exchange Purchase and Sale Agreement ("RPSA") template should reflect this full share for PF Exchange rate customers of Environmental Attributes and carbon emission credits and similar carbon instruments associated with those resources. Failure to so reflect this full share would be inequitable and would also be contrary to the provisions of the Northwest Power Act, including particularly the provisions of section 7 thereof with respect to the allocation of costs and benefits.

Additionally, it is not apparent that the terms of the proposed Exhibit H (in the draft Template or any other similar BPA draft template) is consistent with applicable provisions of federal law or regulations that govern the disposition of federal property. In any event, adoption of Exhibit H as proposed by BPA would be arbitrary and capricious or otherwise contrary to law.

III. THE USE OF "UNSPECIFIED RESOURCE AMOUNTS" IN THE DRAFT TEMPLATES MUST BE ELIMINATED OR CIRCUMSCRIBED, CONSISTENT WITH THE LANGUAGE AND INTENT OF SECTION 5(B)(1) OF THE NORTHWEST POWER ACT.

A. INTRODUCTION

The draft Templates for Regional Dialogue Contracts contain provisions under which it is contemplated that "Unspecified Resource Amounts**"** are somehow "dedicated" to serve a utility's firm load in the region under a Northwest Power Act section 5(b) net requirements contract but are not attributed to a particular generating facility or power purchase contract:

(i) Under section 2.72 of the draft Template:

"Unspecified Resource Amounts**"*(03/21/08 Version)*** means an amount of firm power «Customer Name» has agreed to supply and dedicate to serve its Total Retail Load and which is not attributed to a particular Generating Resource or Contract Resource.

(ii) Under section 2.58 of the draft Template:

"Specified Resources"(06/30/08 Version) means Generating Resources or Contract Resources that have nameplate capabilities or maximum hourly purchase amounts greater than 200 kilowatts, that «Customer Name» has named and that «Customer Name» is required by statute or agrees to dedicate to serve its Total Retail Load. Such resources are identified as specific non-federal resources or as specific contracts with identified parties.

(iii) Under section 2.12 of the draft Template:

"Dedicated Resource(s)" ***(05/28/08 Version)*** means those Specified Resources and Unspecified Resource Amounts that «Customer Name» obligates itself to provide or is required by statute to provide under this Agreement for use to serve its Total Retail Load.

Thus, the amount of power purchased from BPA by a utility under a Northwest Power Act section 5(b) net requirements contract may be established at least in part under the draft Template through the use of Unspecified Resource Amounts without identifying Specified Resources. This concept is unsound and should be eliminated from the draft Template.

B. BPA SHOULD AND MUST ELIMINATE FROM THE DRAFT TEMPLATE THE CONCEPT OF "UNSPECIFIED RESOURCE AMOUNTS" AND INSTEAD REQUIRE THAT ANY UTILITY'S POWER CONTRACT UNDER SECTION 5(B)(1) OF THE NORTHWEST POWER ACT REFLECT ALL ACTUAL RESOURCES THAT WILL BE USED TO SERVE SUCH UTILITY'S FIRM LOAD IN THE REGION.

Northwest Power Act section 5(b)(1) reads as follows:

> Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 [16 U.S.C. 832 et seq.] and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds—
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> (A) the capability of such entity's firm peaking and energy resources used in the year prior to December 5, 1980, to serve its firm load in the region, and
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> (B) such other resources as such entity determines, pursuant to contracts under this chapter, will be used to serve its firm load in the region.
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> In determining the resources[1] which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

[1] Section 3(19) of the Northwest Power Act defines "resource," as the "electric power, including the actual or planned electric power capability of generating facilities". 16 U.S.C. § 839a(19)(A). Thus, "resource" under the Northwest Power Act includes power generated by generating facilities and power purchased under a contract.

Northwest Power Act, §5(b)(1), 16 U.S.C. § 839c(b)(1). Thus, the statutory definition of resources to be considered in determining a utility's net requirement is resources--

(A) used in the year prior to December 5, 1980, to serve its firm load in the region (hereinafter, "pre-Act resources") or

(B) such other resources as such entity determines, pursuant to contracts under this chapter, will be used to serve its firm load in the region (hereinafter, "post-Act resources").

The legislative history of the Northwest Power Act indicates that post-Act resources are resources (other than pre-Act resources) that will be used to serve the utility's firm load in the region:

> Section 5(b)(1) requires the Administrator to offer to sell to each preference agency and to each investor-owned utility the firm power it needs to meet its firm power load within the region to the extent that it cannot meet its load with its own resources. Those resources must be the resources used in the year prior to enactment of this bill and *such other resources that will be used to serve its firm load in the region*.

Report of the House Committee on Interstate and Foreign Commerce, H. Rep. No. 976, 96th Cong., 2d Sess., page 59 (1890) (emphasis added).

In other words, for purposes of determining the amount of power BPA is required and permitted to sell to a utility under a Northwest Power Act section 5(b) contract, that utility is not permitted to acquire and use actual resources to meet its firm load in the region without the recognition that such utility has determined under such contract to so use such actual resources. However, the "Unspecified Resource Amounts" as defined in the draft Template is merely "an *amount* of firm power" (emphasis added). Indeed, the definition of "Unspecified Resource Amounts" contemplates an amount of firm power the customer "has agreed to supply and dedicate to serve its Total Retail Load and which is not attributed to a particular Generating Resource or Contract Resource."

C. BPA'S 5(B) 9(C) POLICY RECOGNIZES THAT ONLY ACTUAL RESOUCES MAY BE USED IN DETERMINING A UTILITY'S NET REQUIREMENT.

BPA's May 23, 2000 Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act ("5(b) 9(c) Policy") does not contemplate or permit the use of "Unspecified Resource Amounts" in determining a utility's net requirements under section 5(b)(1) of the Northwest Power Act. The 5(b) 9(c) Policy only permits, for purposes of determining a utility's net requirements, use of actual resources. Under the 5(b) 9(c) Policy such actual resources may include market purchases if they are specified by BPA's customer, but the 5(b) 9(c) Policy requires "a customer who elects to use market purchases to serve load that does

not match the customer's existing resources and delivery of Federal power from time to time shall make such market purchases to serve that portion of load that does not match such customer's existing resources and delivery of Federal power under all such circumstances." 5(b) 9(c) Policy, page 5.

In that regard, the 5(b) 9(c) Policy provides in pertinent part at pages 3-5:

> **III. Policy on Determining Net Requirements**
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> **A. Determination of the Amount of Federal Power For Sale Under Section 5(b)(1)**
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> 1. BPA will determine the amount of Federal power for sale under section 5(b)(1) in the manner described below. In making this determination BPA will reduce the amount of Federal power a customer may purchase in accordance with section 9(c) of the Northwest Power Act and section 3(d) of the Northwest Preference Act.
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> * * *
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> (d) Under a section 5(b)(1) contract customers may elect to dedicate other generating resources or contractual resources, in addition to generating resources or contractual resources customers must use to serve load under section III.A.1.(b), to serve their consumer load. Customers can also agree to contractually commit power purchases from the market (market purchases) to serve any remaining amounts of their retail firm power load in the region which is not served by (1) generating resources or contractual resources that a customer must use to serve load under section III.A.1.(b); and (2) additional generating resources or contractual resources that a customer elects to use under this section.
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> * * *
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> (ii) Market purchases used to serve retail firm power load in the region shall be used for the entire 5 year rate period for which BPA establishes rates of general application, except as provided in section III.D.2.
>
> (iii) Consistent with the customer's section 5(b)(1) contract and the customer's product selection, a customer who elects to use market purchases to serve load that does not match the customer's existing resources and delivery of Federal power from time to time shall make such market purchases to serve that portion of load that does not match such

customer's existing resources and delivery of Federal power under all such circumstances.

In any event, the use of concepts such as Unspecified Resource Amounts in determining a utility's net requirements under section 5(b) of the Northwest Power Act is a dramatic departure from BPA's 5(b) 9(c) Policy that would have to be, but has not adequately been, explained.

D. PERMITTING A UTILITY TO USE A RESOURCE TO MEET ITS FIRM LOAD WITHOUT RECOGNIZING THAT THE UTILITY IS COMMITING THAT RESOURCES TO THAT LOAD WOULD PREVENT BPA FROM COMPLYING WITH SECTION 9(C) OF THE NORTHWEST POWER ACT AND SECTION 3(D) OF THE REGIONAL PREFERENCE ACT.

Section 9(c) of the Northwest Power provides in part as follow:

> The Administrator shall, in making any determination, under any contract executed pursuant to [16 U.S.C. 839c], of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

Similarly, the Regional Preference Act includes the following requirement:

> The Secretary, in making any determination of the energy requirements of any Pacific Northwest customer which is a non-Federal utility having hydroelectric generating facilities, shall exclude any amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest by the utility which, through reasonable measures, could have been conserved or otherwise kept available for the utility's own needs in the Pacific Northwest. The Secretary may sell the utility as a replacement therefore only what would otherwise be surplus energy.

Regional Preference Act, § 3(d), 16 U.S.C. § 837b(d). Thus, BPA is required to make determinations regarding the disposition outside the region by a customer of energy from "resources of such customer for service to firm loads in the region"

and "amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest". However, if BPA permits the "Unspecified Resource Amounts" to be "dedicated" by utilities, such as is contemplated by the draft Template, BPA cannot make the determinations required by section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act.

The draft Template fails to recognize the statutory requirement of section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act. Draft Template section 24.6 (Use of Regional Resources *(05/15/08 Version)*), section 24.6.1 provides in part as follows:

> Within 60 days prior to the start of each Fiscal Year, «Customer Name» shall provide notice to BPA of any Firm Power from a Generating Resource, or a Contract Resource during its term, that has been used to serve firm consumer load in the Region and that «Customer Name» plans to export for sale outside the Region in the next Fiscal Year. For purposes of this section 24.6, "Firm Power" means electric power which is continuously made available from «Customer Name»'s operation of generation or from its purchased power, which is able to meet its Total Retail Load, except when such generation or power is curtailed or restricted due to an Uncontrollable Force. Firm Power includes firm energy and firm peaking energy or both.

Thus, the notice required by this provision only extends with respect to Firm Power from "Generating Resource" and "Contract Resource" and does not appear to extend to Firm Power from "Unspecified Resource Amounts". In this regard, assuming *arguendo* that a utility's power contract under section 5(b)(1) of the Northwest Power Act could reflect Unspecified Resource Amounts rather than all actual resources such utility determines will be used to serve its firm load in the region, the draft Template fails to require notice regarding disposition outside the region by a customer of energy from all "resources of such customer for service to firm loads in the region" and "amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest".

E. BPA MUST IN ANY EVENT REQUIRE THAT ANY PREFERENCE UTILITY'S POWER CONTRACT UNDER SECTION 5(B)(1) OF THE NORTHWEST POWER ACT REFLECT FOR PURPOSES OF SECTION 7(B)(2) OF THE NORTHWEST POWER ACT ALL ACTUAL RESOURCES THAT WILL BE USED TO SERVE SUCH UTILITY'S FIRM LOAD IN THE REGION.

BPA should and must eliminate from the draft Template the concept of "unspecified resource amounts" and instead require that any utility's power contract under section 5(b)(1) of the Northwest Power Act reflect all actual resources that will be used to serve such utility's firm load in the region. Further, BPA must in any event require that any preference utility's power contract under

section 5(b)(1) of the Northwest Power Act reflect for purposes of section 7(b)(2) of the Northwest Power Act all actual resources that will be used to serve such utility's firm load in the region.

For example, the use of the concept of "Unspecified Resource Amounts" should not be permitted to lead to the following result:

(i) a utility has a specific resource that it determines to use to help meet its firm load in the region--as reflected by and consistent with a reduced purchase from BPA by that utility under its section 5(b) net requirements contract, as compared with the amount that would have been purchased by such utility under such contract if the utility did not have and use the specific resource to help meet its firm load in the region,

(ii) the utility's section 5(b) net requirements contract does not "dedicate" that specific resource but rather "dedicates" Unspecified Resource Amounts, in lieu of "dedicating" such specific resource in and yet does not "dedicate" that resource, and

(iii) the "undedicated" specific resource is considered to be available for inclusion in the section 7(b)(2) resource stack.

Such a result would be unnecessary and contrary to the intent of the Northwest Power Act. BPA preference customers should not be able to use resources that are "owned or purchased" pursuant to 7(b)(2)(D) of the Regional Power Act to serve their firm loads in the region without such resources being considered committed to their firm loads in the region under their section 5(b) net requirements contracts. Such a result would be contrary to the provisions and intent of the Northwest Power Act.

Such a result is avoided by limiting any "Unspecified Resource Amounts" to market purchases that are to serve load that does not match the customer's existing resources and delivery of Federal power from time to time; *provided*, that «Customer Name» shall make any such market purchases to serve that portion of load that does not match such customer's existing resources and delivery of Federal power under all such circumstances.[2]

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[2] This is consistent with the 5(b) 9(c) Policy, which, as discussed above,

(i) permits the inclusion in dedicated resources of actual market purchases if they are specified by BPA's customer and

(ii) requires "a customer who elects to use market purchases to serve load that does not match the customer's existing resources and delivery of Federal power from time to time shall make such market purchases to serve that portion of load that

Such a result is also precluded by including language such as the following in the draft Template:

> If and to the extent that
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> (1) «Customer Name»'s Total Retail Load exceeds
>
> (2) the sum of «Customer Name»'s Firm Requirements Power plus its Specified Resources, then
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> to such extent any «Customer Name» resources that are "owned or purchased" pursuant to section 7(b)(2)(D) of the Regional Power Act but that are not Specified Resources shall be considered committed to the «Customer Name»'s load pursuant to section 5(b) of the Northwest Power Act for purposes of section the Northwest Power Act section 7(b(2) rate step.

IV. BPA SHOULD NOT SUBSIDIZE OR SPREAD THE COST OF PROVIDING TRANSFER SERVICE WITH RESPECT TO ANNEXED LOADS OR NEW PUBLICS

Section 14.6.6 of the draft Template provides as follows:

> **Annexed Loads** ***(03/14/08 Version)***
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> BPA shall arrange and pay for Transfer Service for federal power deliveries to serve «Customer Name»'s Annexed Load. «Customer Name» shall provide BPA written notice of any Annexed Load acquired greater than 1 average megawatt no later than 90 days prior to the commencement of service to the Annexed Load.
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> However, BPA's obligation to provide Transfer Service to «Customer Name»'s Annexed Load shall be limited by the megawatt caps and process for annexed and new public customers set forth in BPA's Long Term Regional Dialogue Final Policy, July 2007, or any revision of that policy.

It should be noted that the "megawatt caps and process for annexed and new public customers" set forth in BPA's Long Term Regional Dialogue Final Policy ("Regional Dialogue Policy") do not represent a final agency action. In that regard, the Regional Dialogue Policy states as follows at page 4: "To the extent BPA believes that any decisions in this Policy *are* final actions for purposes of judicial review, BPA will

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does not match such customer's existing resources and delivery of Federal power under all such circumstances."

5(b) 9(c) Policy, page 5.

expressly say so in the appropriate section of the Policy or ROD." The Regional Dialogue Policy and the accompanying July 2007 Bonneville Power Administration Long-Term Regional Dialogue Record of Decision ("ROD") do not indicate that "megawatt caps and process for annexed and new public customers" are final actions.

The Regional Dialogue Policy generally describes the megawatt caps for annexed loads and new publics as follows at page 42:

> The overall amount of additional Transfer Service provided for annexed loads and new publics will be capped at 50 aMW for each rate period, with a limit of 250 aMW during the term of the Regional Dialogue contracts.

BPA has failed to explain its legal authority for providing and paying for Transfer Service for new and annexed loads—including, in particular, transfer service for non-federal power—and such legal authority is not apparent from the statutes. Further, BPA has failed to adequately explain its rationale for its Transfer Service policy.[3] Failure to properly analyze or address these issues would render BPA's decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In any event, BPA should not provide transfer service to annexed loads and new publics. Providing such transfer service would be an unjustified and unwarranted subsidy that will provide a financial incentive for annexation of investor owned utilities' service territories:

> The Pacific Northwest IOUs commented that BPA should not provide transfer service to annexed loads and new publics. They claim that BPA's proposed policy would be an unjustified and unwarranted subsidy that will provide a financial incentive for annexation of investor owned utilities' service territories. (PNW IOUs, REG-142).

ROD at page 237.[4] Further, if BPA is committed to acquire and pay for Transfer Service in the case of annexation or a new public, then BPA should only provide transfer service in situations where the gaining and losing utilities mutually agree to the annexation or service by the new public. In the absence of this agreement, BPA should not provide and pay for any Transfer Service. *See* REG-142; ROD at page 238.

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[3] For example, BPA has failed to explain the omission from the draft Template of the proposed cost cap on Transfer Service reflected in its ROD.

[4] The Pacific Northwest Investor-Owned Utility Comments on Long-Term BPA Regional Dialogue Policy Issues, October 31, 2006, (REG-142) regarding transfer service are incorporated herein by this reference.